The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

TO: United Auto Workers (UAW) Region 9A
FROM: Prof. Michael Wishnie, Ramzi Kassem, Hunter Smith and Kirill Penteshin
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DATE: February 22, 2008
RE: Tribal Sovereignty and the Casino Smoking Ban

I. Introduction

Under Section 19a-342 of the general statutes, Connecticut conditions the issuance of liquor licenses to, *inter alia*, universities, hotels, resorts, restaurants, cafes, taverns, railroads, airlines, coliseums, special sporting facilities, theaters, museums and airport clubs and bars on the banning of smoking by those establishments. You have asked us to consider whether the State of Connecticut has the authority to add casinos to that list, even though currently the only casinos operating in Connecticut are located on tribal reservations. We conclude that the State has the authority to enact the proposed legislation and apply it to the existing tribally-owned casinos: 1) under the terms of the Tribal-State Gaming Compacts between the Tribes and the State of Connecticut (hereafter "Tribal-State Compacts"),[1] and 2) pursuant to Title 18 U.S.C. § 1161, which, as affirmed by the U.S. Supreme Court in *Rice v. Rehner*, 463 U.S. 713 (1983), constitutes a grant of authority by the U.S. Congress to the states to regulate the sale of liquor on Indian tribal land.

[1] The document that governs the gaming operations of the Mashantucket Pequot Tribe is technically not a "compact"" but rather "federal procedures" imposed on the State by the Secretary of Interior under the Indian Gaming Regulatory Act. Since this distinction has no relevance to the authority of the State to enact the proposed legislation and since its relevant provisions are identical to those of the compact between the State and the Mohegan Tribe, we refer to it as a tribal-state compact.

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II. Consent to be Regulated in the Tribal-State Compacts

The non-smoking ban codified by Section 19a-342(b)(1)(E) currently covers establishments receiving liquor licenses under §§ 30-20a, 30-21, 30-21b, 30-22, 30-22a, 30-22c, 30-26, 30-28, 30-38a, 30-33a, 30-33b, 30-35a, 30-37a, 30-37c, 30-37e, 30-37f and 30-23 of the general statutes. By extending the state-wide smoking ban to include institutions with liquor licenses issued pursuant to C.G.S. § 30-37k, the proposed legislation does no more than impose a condition upon the sale of alcoholic beverages at casinos. Under the terms of the Tribal-State Compacts, the Tribes have consented to be governed by state regulations on the sale of alcohol within their casinos.

Section 14(b) of both of the Tribal State-Compacts states:

> Regulation of alcoholic beverages. Service of alcoholic beverages within any gaming facility shall be subject to the laws and regulations of the State applicable to sale or distribution of alcoholic beverages.

Accordingly, the proposed casino smoking ban is authorized by the plain language of the Tribal-State Compacts.

The authority of the State to regulate liquor licenses within the gaming facilities is also recognized in the tribal laws of both the Mohegan and Mashantucket Pequot Tribes. Article V, § 3-272. of the Mohegan Tribe's Code of Ordinances recognizes that the "laws of the State of Connecticut . . . apply to the service of alcoholic beverages within any Gaming Facility of The Tribe by virtue of the State of Connecticut-Mohegan Tribe Gaming Compact." Similarly, Title XVII § 2(a) of the Mashantucket Pequot Tribal Law states that within the Tribe's

gaming facility, "the laws and regulations of the state of Connecticut applicable to the sale and distribution of alcoholic beverages are enforced by the State."

Given the clear and binding agreement entered into by the Tribes and the State to the effect that the State's liquor licensing laws apply within tribal casinos, it is plain that the State has the legal power to require a smoke-free environment as a condition on the service of alcohol within said casinos. The imposition of such a condition is consistent both with how the State has regulated the service of alcohol in restaurants, bars and public accommodations across the State, and with the State's recogition of both its rights and responsibilities under the Tribal-State Compacts. [2]

III. Authority to Regulate the Sale of Liquor under 18 U.S.C. § 1161 and *Rice v. Rehner*

Even without the consent expressed in the Tribal-State Compacts, the State has authority to extend § 19a-342 to casinos. The proposed amendment simply modifies the terms and conditions for receipt of a state liquor license. The U.S. Congress, which the U.S. Supreme Court has recognized as having "plenary power to legislate in the field of Indian affairs," *United States. v. Lara*, 541 U.S. 193, 200 (2004), has explicitly granted states the power to require a license for liquor sale on tribal lands under 18 U.S.C. § 1161. The proposed modification is a legitimate exercise of this delegated regulatory power.

[2] In a formal opinion published October 1, 2003 (Op. Atty. Gen. No. 2003-017), the Attorney General recognized an alternate ground upon which the State may enact a smoking ban at the casinos. The Attorney General found that the State had the power to enact a smoking ban under Section 14(a) of the Tribal-State Compacts, under which "the Tribes are required to adopt health and safety standards that are as restrictive as the State's standards."

Historically, Indian tribes have not enjoyed sovereign power to control the sale of liquor on tribal land. Between 1822 and 1834, Congress enacted sweeping alcohol prohibitions on Indian land, culminating in the Trade and Intercourse Act of 1834, which prohibited the introduction of liquor into Indian country, the operation of a distillery therein, or the sale or conveyance of alcohol to any Native American therein. The Act was amended in 1862 to prohibit alcohol sale to any Native American under the superintendence of a federal agent. In 1948, the Trade and Intercourse Act and its subsequent amendments were codified in 18 U.S.C. §§ 1154, 1156. Recognizing the discriminatory nature of these statutes, Congress enacted 18 U.S.C. § 1161 in 1953, which lifted the federal prohibition on alcohol sales on tribal land, but nonetheless required that all such sales take place in conformity with both state and tribal law.

In *Rice v. Rehner*, the U.S. Supreme Court held that under 18 U.S.C. § 1161 the State of California had the authority to require a federally-licensed Indian trader operating on the Pala Reservation in San Diego, California to obtain a state liquor permit. Justice O'Connor, writing for the Court, stated:

> Our examination of § 1161 leads us to conclude that Congress authorized, rather than pre-empted, state regulation over Indian liquor transactions.
>
> The legislative history of § 1161 indicates both that Congress intended to remove federal prohibition on the sale and use of alcohol imposed on Indians in 1832, and that *Congress* intended that state laws would apply of their own force to govern tribal liquor transactions as long as the tribe itself approved these transactions by enacting an ordinance.

Rice v. Rehner, 463 U.S. 713, 726 (1983).

The right of states to regulate liquor licensing and enforce associated public policy on tribal lands is supported by contemporary federal case law. In the recent case of

Van Kruiningen v. Plan B, LLC, 485 F.Supp.2d 92 (D. Conn. 2007), former employees of clubs operating on the premises of the Mohegan Sun Casino brought suit against the clubs' owner Plan B, LLC d/b/a "Mohegan After Dark," *inter alia*, for wrongful discharge in violation of public policy. The employee-plaintiffs claimed that they had been discharged in retaliation for reporting the serving of alcohol to minors by club staff, in violation of C.G.S. § 30-86. The U.S. District Court for the District of Connecticut rejected the defendant's motion to dismiss on grounds of tribal sovereign immunity from this element of state public policy, and, citing *Rice v. Rehner*, stated that "with respect to the specific public policy at issue here, the Supreme Court has found that 'tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians,' rather, there is a 'historical tradition of concurrent state and federal jurisdiction over the use and distribution of alcoholic beverages in Indian country... justified by the relevant state interests involved.'" (*Van Kruiningen*, 485 F.Supp.2d at 97, citing *Rice*, 463 U.S. at 722, 724). The District Court went on to hold that "Connecticut's public policy prohibiting serving alcohol to minors, as articulated in Conn. Gen.Stat. § 30-86, applies to defendant here, notwithstanding that its business is operated on the Mohegan Reservation" (*Van Kruiningen*, 485 F.Supp.2d at 98).[3]

IV. Conclusion

No law anywhere privileges tribal casinos to sell alcohol under terms and conditions any different than those that govern public accommodations elsewhere in

[3] *See also Citizen Band of Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 975 F.2d 1459 (10th Cir. 1992) (citing *Rice*, and upholding state's right to require tribe to obtain state license for sale of beer on tribal land), *Fort Belknap Indian Community of Fort Belknap Indian Reservation v. Mazurek*, 43 F.3d 428 (9th Cir. 1994) (citing *Rice*, and upholding state's power to prosecute violations of its liquor laws by tribal members on reservations).

Connecticut. Under the Tribal-State Compacts, and under controlling federal law, Connecticut liquor laws apply. If Connecticut liquor laws ban smoking as a condition of holding a liquor license, the Tribal casinos must comply, or give up their license to sell liquor.